

HONORABLE VERA M. SCANLON

United States Magistrate Judge

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November 19, 2015

By ECF

Honorable Vera M. Scanlon
United States Magistrate Judge
225 Cadman Plaza East, 505 North
Brooklyn, New York 11201

Re: *Lebowitz et al. v. New York City Department of Education, et al.*,
15 Civ. 2890 (WFK)(VMS)
Our No. 2015-034601

Dear Magistrate Judge Scanlon:

I am an Assistant Corporation Counsel in the Office of Zachary W. Carter, Corporation Counsel of the City of New York, attorney for defendants in the above-referenced action. Pursuant to the Court's order, docketed November 16, 2015, defendants submit this letter in response to plaintiffs' motion to file a second amended complaint in this action. *See* plaintiff's motion to amend, filed November 13, 2015, Docket Entry No. 19.

Plaintiff Lebowitz filed his complaint in this action on May 19, 2015. *See* complaint, Docket Entry No. 1. On September 24, 2015, plaintiffs Black and Reznikov filed a complaint with this Court in a separate action. On October 20, 2015, following plaintiffs' motion to consolidate, the two matters were consolidated by this Court, under Civil Action No. 15 Civ. 2890.

A pre-motion conference on defendants' anticipated motion to dismiss was held on October 1, 2015, before the Honorable William F. Kuntz II, United States District Judge, Eastern District of New York. Pursuant to Judge Kuntz's order, docketed October 1, 2015, plaintiffs filed their first amended complaint on October 30, 2015. *See* Docket Entry No. 18.

The Court's Scheduling Order directs that there were to be no amendments to the pleadings after October 30, 2015, "unless information unknown to the parties by this date later becomes available to them." *See* Scheduling Order at 1, Docket Entry No. 11. Pursuant to the Scheduling Order, the parties were to stipulate or commence motion practice to amend the

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pleadings by October 30, 2015, in accordance with the individual practice rules of Judge Kuntz. *Id.* at 1-2.

Two weeks following the expiration of the deadline, on November 13, 2015, plaintiffs' filed their motion to file a second amended complaint. *See* Docket Entry No. 19. Plaintiffs do not allege that their motion to file a second amended complaint is based on information that was previously unknown to them. Nor do they provide an explanation for the lateness. Not only is plaintiffs' motion untimely, but it also fails to follow the Judge Kunz's Individual Motion Practices and Rules which require a party seeking to amend a pleading pursuant to Rule 15, to request a pre-motion conference with the Court prior to making the motion to amend. *See* Judge Kunz's Indiv. Rule III.B.1.(iv).

Furthermore, plaintiffs' motion does not attach the proposed second amended complaint. Nor did plaintiffs provide a copy of the proposed second amended complaint to defendants. Defendants, therefore, cannot form an opinion as to whether the proposed second amended complaint would survive a motion to dismiss under Rule 12(b)(6) or would be futile. *See Foman v. Davis*, 371 U.S. 178 (1962); *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012).

Additionally, Judge Kuntz's October 1, 2015, order sets forth a briefing schedule for defendants' anticipated motion to dismiss. Pursuant to that order, defendants' response to the amended complaint must be filed on or before Friday, December 11, 2015.¹ The addition of new claims at this stage of the litigation is prejudicial to defendants to the extent that they have no additional time to respond to the proposed second amended complaint. Furthermore, pursuant to the Scheduling Order, the parties have already served initial document requests and interrogatories in this matter, without having seen the proposed second amended complaint or being aware that plaintiff Reznikov would be adding claims that were not included in the first amended complaint.

Accordingly, defendants cannot consent to plaintiffs' request to file a second amended complaint in this action, and plaintiff's untimely motion to amend for a second time should be denied.

Respectfully submitted,

/s/ Alexis Downs

Alexis Downs

Assistant Corporation Counsel

cc: White, Ricotta & Marks, PC
(By ECF)

¹ The order reads "Amended Complaints."